

89-1182

No. _____

Supreme Court, U.S.

FILED

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JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1989

COMMONWEALTH OF KENTUCKY

PETITIONER

versus

CHARLES DAVID JOHNSON

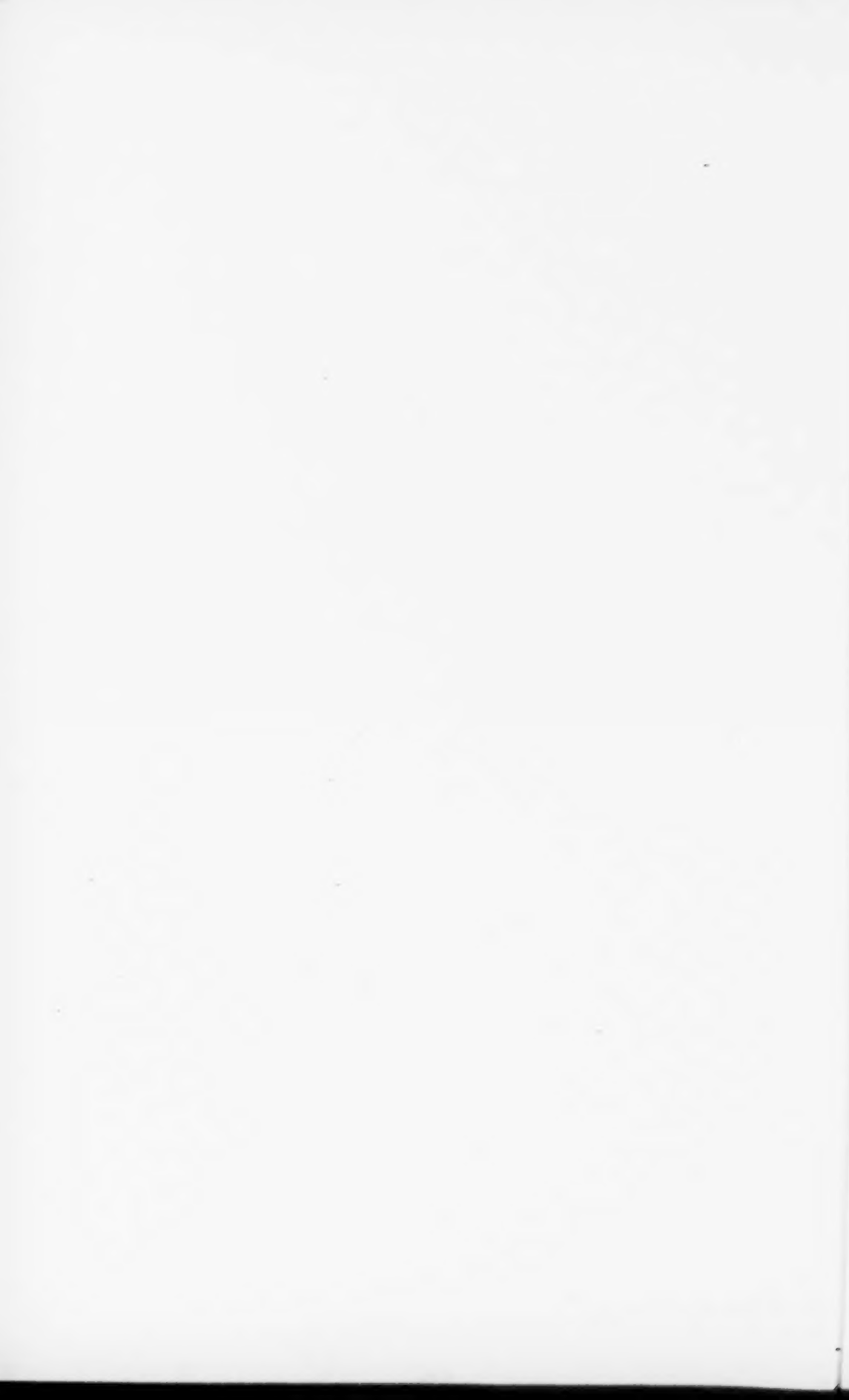
RESPONDENT

VOLUME II -- APPENDIX
PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF KENTUCKY

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SUPREME COURT OF KENTUCKY

Nos. 88-SC-184-DG & 88-SC-425-DG

COMMONWEALTH OF KENTUCKY

APPELLANT

v. ON APPEAL FROM THE COURT OF APPEALS

CHARLES DAVID JOHNSON

APPELLEE

AND

CHARLES DAVID JOHNSON

CROSS-APPELLANT

vs. ON CROSS-APPEAL FROM THE COURT OF APPEALS

COMMONWEALTH OF KENTUCKY

CROSS-APPELLEE

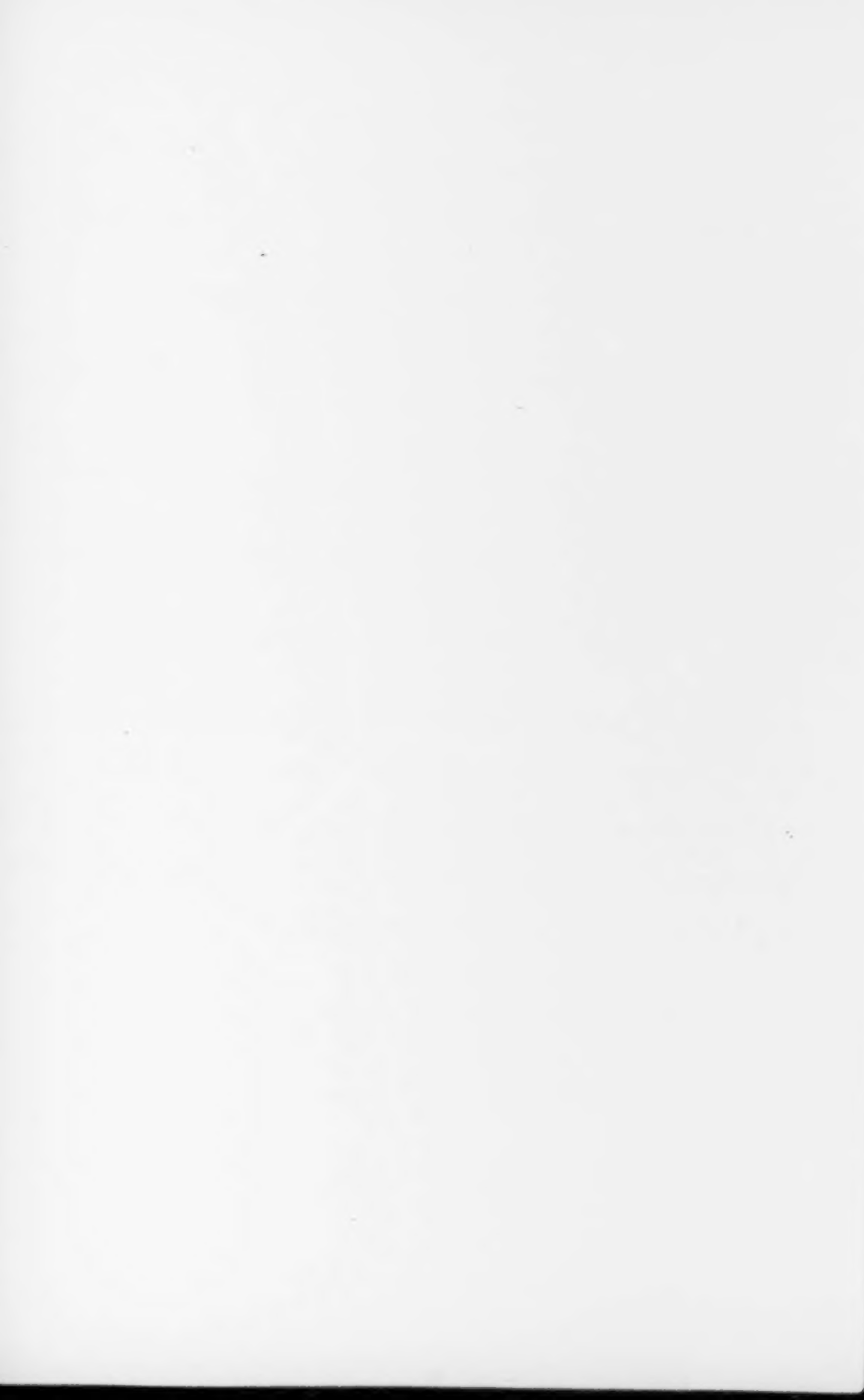
ORDER DENYING PETITIONS FOR REHEARING

The petitions for rehearing of this court's opinion rendered June 8, 1989, filed by the appellant Commonwealth of Kentucky and by the cross-appellant Charles David Johnson are denied.

All concur.

Entered: November 9, 1989

/s/ Robert F. Stephens
Chief Justice



Rendered: June 8, 1989
TO BE PUBLISHED

SUPREME COURT OF KENTUCKY

No. 88-SC-184-DG & 88-SC-425-DG

COMMONWEALTH OF KENTUCKY

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OPINION OF THE COURT BY JUSTICE LAMBERT

AFFIRMING IN PART AND REVERSING IN PART ON APPEAL

AFFIRMING ON CROSS APPEAL

The primary issue in this case is whether certain evidence used against appellant was lawfully obtained. On two separate occasions,

three days apart, appellant was found to be in possession of illegal drugs, drug paraphernalia, and in the first instance, a handgun. The trial court overruled both of appellant's motions to suppress the evidence, but the Court of Appeals reversed holding that the police officer's act of shining a flashlight into a darkened hotel room, and their act of forcing their way into another hotel room, violated Section 10 of the Kentucky Constitution and the Fourth Amendment to the Constitution of the United States. We granted the Commonwealth's motion for discretionary review to consider the issues it presented. We likewise granted appellant's cross-motion for discretionary review to consider his claims of trial error.

I. Evidence Obtained at the
Penny Pincher Motel

At approximately 6:00 a.m. on September 14, 1985, the Erlanger Police were summoned to the motel in response to a complaint from a guest of a disturbance. The guest had reported that someone was beating on his door with a baseball



bat. Upon the officer's arrival, appellant was found standing in an outside hallway between two motel rooms. One of the police officers knew appellant to be a drug user and perceived him to be under the influence of drugs at that time. During questioning, the police learned that appellant's room was number 165 and observed that the door was slightly ajar. While one officer talked with the appellant and asked for his identification, the other shined a flashlight through the partially open door into the darkened room. Just inside the door on a table top, the officer observed drug paraphernalia and a white powder substance. After this discovery, the officer noticed an opening in the window curtain. As he had done before and without entering the room, he shined his flashlight through the window and observed a handgun under the bed. Appellant was arrested, the police obtained a search warrant, and upon their search, cocaine, drug paraphernalia, and a

handgun were found. Subsequently, appellant was convicted of various drug possession offenses and possession of a handgun by a convicted felon.

Prior to trial, appellant moved the court to suppress the evidence. His motion was denied. On appeal, however, the Court of Appeals reversed. It held that the act of shining a flashlight beam into a darkened room amounted to a warrantless search in violation of appellant's constitutional rights.

At the outset we must determine whether the act complained of constitutes a search within contemplation of the Fourth Amendment and Section 10 of the Constitution of Kentucky. From the facts presented the police were entirely within their rights to go upon the motel premises and to the location where appellant was encountered. A disturbance had been reported to them and their assistance had been requested by the management of the motel. Upon seeing appellant in the hallway at or near



the location of the reported disturbance and upon discerning that he appeared to be under the influence of drugs, their attention was naturally drawn to him, and by virtue of his whereabouts, to his room.

By design, rooms in modern motels are easily accessible and in close proximity to places of public passage. Many such rooms have picture windows with only a curtain to prevent public view. Without diminishing an individual's right to be protected from an unreasonable search of his motel room, Stoner v. California, 376 U.S. 483, 84 S.Ct. 889, 11 L.Ed.2d 856 (1964), we note that when one takes lodging in a motel it is with the certain knowledge that substantial numbers of persons unknown to him will be nearby and in a position to invade his privacy unless caution is exercised to prevent it. As such, what would be sufficient vigilance to preserve one's privacy in a home, apartment or office may be insufficient in a motel room. This view was



recognized in People v. Berutko, Ca., 453 P.2d 721 (1969), as follows:

Essential to the determination of reasonableness in cases wherein officers obtain probable cause for arrest through their own observation is a consideration of the degree of privacy which a defendant may reasonably expect in a given enclosure accepted by him, whether or not that enclosure be his residence. (Emphasis added.)

In those instances when the police have a legitimate reason for their presence on the motel premises, we are without reluctance in holding that one who asserts that his rights have been violated by an unreasonable search accomplished by looking through a motel room window or door must show that he took precautions sufficient to create an objectively reasonable expectation of privacy. Otherwise, that which was seen was in plain view. Harris v. U.S., 390 U.S. 234, 88 S.Ct. 992, 19 L.Ed.2d 1067 (1968).



Having concluded that appellant's act of leaving his motel room door and window partially open to public view deprived him of a reasonable expectation of privacy, of what significance then is the police officer's use of a flashlight to look inside? In Texas v. Brown, 460 U.S. 730, 103 S.Ct. 1535, 75 L.Ed.2d 502 (1983), the Supreme Court broadly declared that ". . . the use of artificial means to illuminate a darkened area simply does not constitute a search, and thus triggers no Fourth Amendment protection." Likewise, in U.S. v. Richardson, 388 F.2d 842 (CA6, 1968), the court held that use of ultra-violet light to determine if the defendant had touched a bank bag dusted with fluorescein powder was not a search within the fourth amendment. This court reached a similar result in Rudolph v Commonwealth, Ky., 474 S.W.2d 376 (1971), but our holding was premised on the officer's legitimate concern for his safety as a reason for his use of a flashlight. We are now



of the opinion that a determination of whether or not contraband is in plain view should not depend on existing lighting conditions or the time of day. One seeking to maintain his privacy should reasonably expect that persons disposed to look inside a motel room will not hesitate to enhance their visibility by use of a widely available device such as a flashlight. In Texas v. Brown, supra, in commenting upon the fact that the officer "bent down at an angle so [he] could see what was inside," the court said:

The general public could peer into the interior of Brown's automobile from any number of angles; there is no reason Maples should be precluded from observing as an officer what would be entirely visible to him as a private citizen.

In Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971), in its plurality opinion the court set forth three requirements for a valid plain view seizure. These requirements are: prior justification for the officer's presence, inadvertence of



discovery, and immediate apparentness that evidence has been found. Observation of these limitations provides sufficient protection for the public as guaranteed by Section 10 of the Constitution of Kentucky and the Fourth Amendment to the Constitution of the United States. On this issue we reverse the Court of Appeals.

II. Evidence Obtained at
The Ramada Inn

On September 17, 1985, three days after appellant's arrest at the Penny Pincher Motel and following his release on bond, an off duty police officer observed appellant in the parking lot of the Ramada Inn. Upon probable cause, the sufficiency of which is not at issue here, the police obtained a warrant to search appellant's automobile.* Prior to commencement of the

*In addition to appellant's automobile, the police sought a warrant to search his motel room. The district judge to whom the affidavit was presented determined that probable cause was not shown for a search of the room and declined to issue the warrant.]



search, the officer went to appellant's motel room to inform him of the warrant and give him an opportunity to accompany them to the car and provide the keys.

Upon arrival at appellant's motel room, and consistent with what appears to be his normal practice, the police discovered the door standing slightly open. The officer knocked on the door and appellant, wearing only undershorts and a pair of boots, stepped out into the hallway. When informed of the search warrant for his car, appellant indicated he would provide a key and that he wanted to accompany the officers to observe the search. Attempting to re-enter his room to dress and obtain his keys, appellant discovered that he had locked himself out. As his attire was unsuitable for public activity and he did not have his keys on his person, one of the police officers offered to obtain a key from the motel office. Upon the



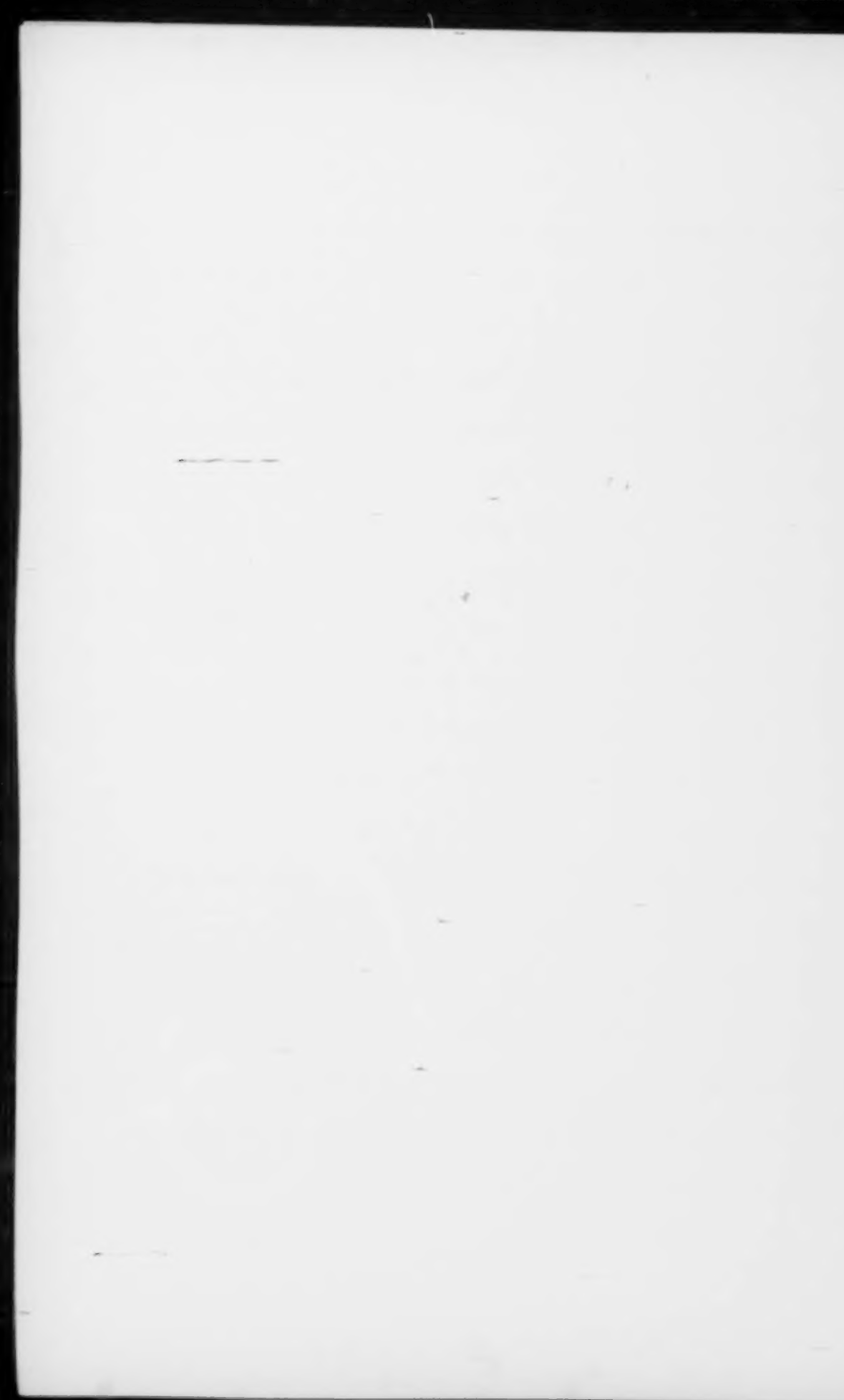
officer's return with the passkey, appellant entered his room and attempted to slam the door behind him. One of the officers prevented the door from closing and the officers then forcibly entered the room. Once inside, the police discovered drugs and drug paraphernalia.

The Commonwealth argues that the police were entitled to force their way into the motel room to protect their personal safety. We are reminded that just three days earlier appellant had been found in possession of a handgun and the Commonwealth reiterates that appellant had stated he wished to accompany the police during the automobile search. On the theory that appellant would enter his room and return with a gun or other weapon, the Commonwealth argues that Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968) and Michigan v. Long, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983), authorized the police to maintain observation of appellant while he was inside his



room. As such observation could only be accomplished by entering the motel room, the Commonwealth argues, the police were within their rights to force their way inside.

We need not burden this opinion with a review of the various exceptions to the warrant requirement of the United States and Kentucky Constitutions. It is sufficient to say that we have examined the authorities and are not persuaded that the police are authorized, in anticipation of executing a search warrant upon a person's property in another location, to constantly observe him at a time at which he is not under arrest. If such an intrusion were permitted upon the basis of generalized police safety considerations, the police would be authorized to engage in forced, warrantless searches in a multitude of otherwise prohibited circumstances. Cf. Shanks v. Commonwealth, Ky., 504 S.W.2d 709 (1974). A warrantless search upon the basis of a pretextual arrest is



invalid. Amador-Gonzalez v. United States, 391 F.2d 308 (CA5 1968). It follows with greater logical force that a mere apprehension for personal safety, and the opportunity such provides for pretext, is insufficient to create an exception to the warrant requirement.

By the views expressed in this opinion, we do not denigrate the legitimacy of police officers' concern for their personal safety. We recognize, however, that preservation of constitutional rights frequently conflicts with an officer's perception of his need to protect himself. This court and other courts have willingly found exceptions to various constitutional provisions to better insure the safety of police officers. Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 407, 9 L.Ed.2d 889 (1968); Pennsylvania v. Mimms, 434 U.S. 106, 98 S.Ct. 330, 54 L.Ed.2d 331 (1977); Adams v. Williams, 407 U.S. 143, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972); Phillips v. Commonwealth, Ky., 473 S.W.2d 135 (1971); Rudolph v. Commonwealth, Ky., 474 S.W.2d 376 (1971). We are not willing,



however, to recognize exceptions so broad as to render meaningless the right secured by the Constitution of Kentucky.

Without expressing any view as to the result which would be reached in this case by application of the Fourth Amendment to the Constitution of the United States and applicable decisions of Federal Courts, we hold that the warrantless, forced entry by the police into appellant's room at the Ramada Inn, violated Section 10 of the Constitution of Kentucky, and the evidence found therein must be suppressed. On this issue we affirm the Court of Appeals.

III. Issues on Cross-Appeal

Appellant first contends that the trial court erred to his prejudice by permitting a police officer to testify that when appellant's room was searched, the police wore rubber gloves because they had heard he ". . . might have AIDS or some other disease." In Wiggins v. Maryland, Md.Ct.App. 57 USLW 2539 (March 7, 1989) (No.



94-1988), the court noted that ". . . a climate of fear still surrounds the disease," and held

it is not far-fetched that the jury, observing the (rubber) gloves, thought it better in any event, that the defendant be withdrawn from public circulation and confined in an institution with others of his ilk.

We agree with the Maryland Court that raising the specter of AIDS, without substantial relevance in bringing this to the attention of the jury, may result in unfair prejudice. In this case, however, the trial court's error in the admission of this evidence was harmless.

RCr 9.24. Appellant was convicted of possession of cocaine, possession of drug paraphernalia, and possession of a handgun by a convicted felon. The evidence of his guilt was overwhelming and his substantial rights were not affected.

Finally, appellant's claim that he was prejudiced by evidence that his home had been searched by the police on an earlier occasion is



without merit for two reasons. First, the absence of any carpentry tools at appellant's place of dwelling was relevant to rebut his testimony that he worked as a carpenter. Second, defense counsel raised an issue concerning police surveillance of appellant. The Commonwealth was thus entitled to explain that their surveillance resulted in the issuance of a search warrant. Moreover, the fact that no evidence of criminal activity was found at appellant's residence may have been to his advantage. Certainly, we are unprepared to say that he was prejudiced by this testimony.

CONCLUSION

For the foregoing reasons and as set forth herein, upon the Commonwealth's appeal, we affirm in part and reverse in part; upon the cross appeal by appellant, we affirm. This cause is remanded to the trial court for further proceedings in conformity herewith.



As to Section I, all concur except Combs, J., not sitting. As to Section II, Lambert, Leibson and Vance, JJ., concur; Wintersheimer, J., dissents by separate opinion in which Stephens, C. J., and Gant, J., join; Combs, J., not sitting. On this issue the Court of Appeals is affirmed by an equally divided Court. As to Section III, all concur except Combs, J., not sitting.

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RENDERED: June 8, 1989
TO BE PUBLISHED

SUPREME COURT OF KENTUCKY

Nos. 88-SC-184-DG & 88-SC-425-DG

COMMONWEALTH OF KENTUCKY APPELLANT

ON REVIEW FROM COURT OF APPEALS
v. 86-CA-748-MR
(Kenton Circuit Court #85-CR-195)

CHARLES DAVID JOHNSON APPELLEE

AND

CHARLES DAVID JOHNSON CROSS-APPELLANT

ON REVIEW FROM COURT OF APPEALS
vs. 86-CA-1305-MR
(Kenton Circuit Court #85-CR-195)

COMMONWEALTH OF KENTUCKY CROSS-APPELLEE

DISSENTING OPINION BY JUSTICE WINTERSHEIMER

I respectfully dissent from that part of the majority opinion which affirms the decision of the Court of Appeals in regard to the suppression of evidence obtained from a search of the Ramada Inn hotel room. The trial judge correctly overruled the defendant's motion to



suppress evidence obtained in the search.

I specifically and strongly reject any implication from the majority opinion that this search was a pretext. The determination of whether a search is reasonable under the circumstances is predominantly factual and should stay in the hands of the trial judge. A reviewing court should not substitute its findings for those of the trial judge. The trial judge is in the best position to ascertain the facts. Cf. CR 52.01.

When a reasonably prudent police officer believes that his safety or that of others is in danger, he may make reasonable search for weapons of a person believed by him to be armed and dangerous regardless of whether he has probable cause to arrest that individual. This is true even though the officer is not absolutely certain that the individual is armed, although he must secure a warrant when practical



before making search or arrest. Phillips v. Commonwealth, Ky., 473 S.W.2d 135 (1971). When such a search of a person that an officer believes is armed is confined to what is minimally necessary to determine whether the party is armed for the purposes of protecting the officer, the search is reasonable. Phillips, supra; Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). The real dangers with which police officers are confronted in their work on a daily basis cannot be ignored. Here the officers knew that a gun had been found in Johnson's motel room only three days earlier at the Pennypincher in Erlanger. The Fourth Amendment to the United States Constitution does not require a police officer who lacks the precise level of information necessary for probable cause to simply allow a crime to occur or a criminal to escape. Terry, supra, recognizes that an intermediate response may be appropriate and



that a brief stop of a suspicious individual in order to maintain the status quo momentarily while obtaining more information may be reasonable in the light of the facts known to the officers at the time. Adams v. Williams, 406 U.S. 143, 92 S.Ct. 1921, 32 L.Ed.2d 616 (1972).

Johnson was not a less dangerous suspect by the mere fact that he was not under arrest when the officers asked him for the keys to his car. Other state courts have found it reasonable to permit police officers to protect themselves while they are still investigating a possible crime. See Commonwealth v. Daniels, 280 Pa. 278, 421 A.2d 721 (1980); State v. Mayfield, 10 Kans.App. 2d 175, 694 P.2d 915 (1985). The reasoning of the Pennsylvania and Kansas courts was sensible and correct and properly persuasive when applied to the actions of the police in this case.

The United States Courts of Appeals have recently indicated that a protective search can be appropriate in certain circumstances. See United States v. Johnson, 637 F.2d 532 (8th Cir. 1989); United States v. McClinnhan, 660 F.2d 500 (D.C. Cir. 1982).

The United States Supreme Court has recognized that suspects may injure police and others by virtue of their access to weapons even though they may not be armed. Michigan v. Long, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983). The U.S. Supreme Court determined that an interpretation of Terry, supra, need not restrict the preventative search to the person of the detained subject. If a suspect is dangerous, he is no less dangerous simply because he is not arrested.

The United States Supreme Court has applied a common sense approach to this dangerous and delicate area of constitutional interpretation. A proper interpretation of Section 10 of the

Kentucky Constitution and the Fourth Amendment to the Federal Constitution both provide reasonable protection for police in exercising a protective search. The police entry into Johnson's Ramada Inn room was perfectly reasonable to assure that he did not emerge with gun in hand.

I would reverse the decision of the Court of Appeals and reinstate the judgment of the circuit court.

Stephens, C.J., and Gant, J., join in this dissent.

OPINION RENDERED: February 19, 1988;
10:00 a.m.
TO BE PUBLISHED

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS

No. 86-CA-748-MR

CHARLES DAVID JOHNSON APPELLANT

APPEAL FROM KENTON CIRCUIT COURT
v. HONORABLE DOUGLAS M. STEPHENS, JUDGE
ACTION NO. 85-CR-195

CHARLES DAVID JOHNSON APPELLEE

AND NO. 86-CA-1305-MR

CHARLES DAVID JOHNSON APPELLANT

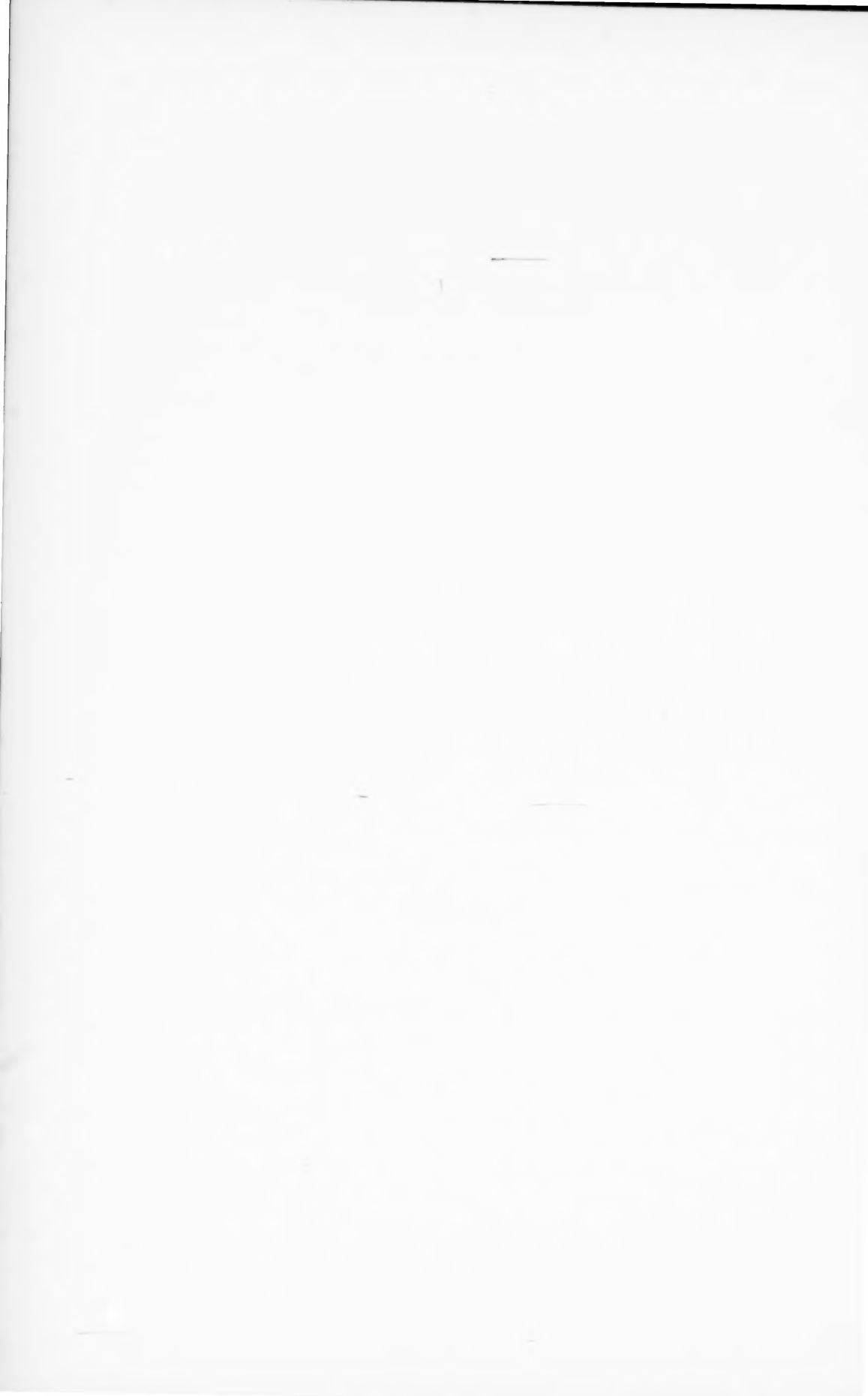
APPEAL FROM KENTON CIRCUIT COURT
vs. HONORABLE DOUGLAS M. STEPHENS, JUDGE
ACTION NO. 85-CR-195

COMMONWEALTH OF KENTUCKY APPELLEE

REVERSING

* * * * *

BEFORE: COMBS, LESTER and MILLER, Judges.



COMBS, JUDGE. Charles David Johnson, appeals his conviction in the Kenton Circuit Court of two counts of possession of a controlled substance, two counts of possession of drug paraphernalia, and his additional conviction as a persistent felony offender. Johnson was sentenced to fifteen years' imprisonment and was fined \$11,000.00.

Johnson set forth four grounds for reversal. Two of his grounds are that his two motions to suppress evidence were improperly overruled under the Fourth Amendment to the United States Constitution and Section 10 of the Kentucky Constitution. His other two grounds are that his objections to certain testimony adduced by the prosecution during his trial were improperly overruled.

The events leading to Johnson's troubles occurred on two different days in September, 1985, and both took place at or near motel rooms he had rented. A carefully detailed review of these events is necessary.

I. SEPTEMBER 14, 1985, AT
THE PENNY PINCHER MOTEL

A guest in the room next to Johnson's room complained to the motel manager that a man next door was beating on the door with a baseball bat. The manager reported the disturbance to the Erlanger Police Department, and a Sergeant Steffen and Officer Gilbert responded to the call.

The two police approached Johnson who was standing in the hallway between his door and that of the complaining guest. He had no baseball bat and made no attempt to flee. Steffen had prior firsthand knowledge of Johnson, recognized him, and knew him to be a drug user. Steffen perceived that Johnson was under the influence of drugs.

Gilbert asked Johnson for some identification and, while he was questioning Johnson, Steffen noticed that one of the two closest doors was slightly ajar. A "Do Not



Disturb" sign was hanging from the doorknob. Steffen peered through the opening "for his own protection," and "to see if anyone else was in there." The room, Steffen testified, was "totally dark." Steffen shone his flashlight into the room and saw drug paraphernalia and white powder. He also shone his flashlight through the room's window and saw a handgun. Johnson had told them during this time that that room was his. He had not been placed under arrest up to the time Steffen saw the contraband.

Johnson was placed under arrest after Steffen saw the drugs, paraphernalia and handgun. The police entered the room which was otherwise unoccupied. A search warrant was obtained to search the room for the contraband Steffen had just seen. The affidavit made to secure the search warrant did not mention the handgun. Johnson was convicted of possession of cocaine and drug paraphernalia, and possession of a handgun by a convicted felon. He was released from custody subsequent to his arrest.



II. SEPTEMBER 17, 1985, AT
THE RAMADA INN MOTEL

A police officer observed Johnson at the Ramada Inn behaving in a "peculiar manner." He reported this to the Ft. Wright Chief of Police, Gene Weaver. Weaver established that Johnson was registered at the motel.

Arrangements were made for a team from the Airport Police Department's canine unit to go to the scene and perform a "walk around" Johnson's car, a 1985 Cadillac. The team arrived and Pepper, a dog specially trained to smell for drugs was led around Johnson's car. Pepper's reaction was positive for the presence of drugs inside the car.

Weaver then obtained a warrant to search Johnson's Cadillac. The police took the warrant to Johnson's room "as a courtesy" to Johnson, so he would know they were executing the warrant, and to allow him the opportunity to give them the car key in lieu of breaking the locks.



The police knocked on Johnson's motel room door which was ajar about one inch. The police identified themselves as such, but when Johnson saw who they were he attempted to close the door. The police forced the door to remain open, and asked Johnson to step into the hallway.

Johnson stepped into the hallway, and as he did he closed the door and it locked behind him. The police informed him of the warrant to search his car, and asked him if he would give them the key, and care to accompany them while they searched. Johnson said he would give them the key and go with them, but that since he was clad only in his underclothes and boots, he would first need to put on more clothes.

A passkey to the room was obtained and the door opened. Johnson re-entered his room and attempted once again to close the door. The police again forced the door to remain open for, as Weaver testified, "our own personal safety as well as his." Weaver and at least one other



officer stepped into the room. While Johnson proceeded to put on a pair of pants the police "looked around" and saw drug paraphernalia and white powder.

Everyone in the party then went to Johnson's car except one officer who was to guard against anyone entering or leaving the room. The Cadillac had been unlocked all this time. A search of the car proved Pepper's sense of smell to be less than reliable for no drugs or contraband of any kind were discovered.

The undaunted police then obtained a search warrant for Johnson's guarded motel room so they could search for what they had just discovered. This warrant led to Johnson's arrest and conviction for possession of cocaine and drug paraphernalia.

III. THE MOTIONS TO SUPPRESS

Johnson made separate motions to suppress the evidence obtained at both motel rooms, and both motions were overruled. We agree with



Johnson that the evidence in both instances were obtained in violation of his rights under the Fourth Amendment to the United States Constitution and Section 10 of the Kentucky Constitution, and we reverse his convictions.

The Fourth Amendment "protects people from unreasonable government intrusions into their legitimate expectations of privacy." United States v. Chadwick, 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977). "[A] guest in a hotel room is entitled to constitutional protection against unreasonable searches and seizures." Stoner v. California, 376 U.S. 483, 84 S.Ct. 889, 11 L.Ed.2d 856 (1964).

The evidence seized at the Penny Pincher Motel should have been suppressed. The government unquestionably conducted a search of Johnson's room when one of the officers shone a flashlight's beam into his darkened room. The officer's testimony was clear that without the aid of the flashlight he could see nothing. The

government conducts a search when it uses enhanced viewing of the interior of a home, because it impairs a legitimate expectation of privacy. Dow Chemical Company v. United States, 749 F.2d 307 (6th Cir. 1984). A motel room is a person's "home away from home," and as observed in Stoner, supra, any search of one occupied by a guest encounters the Fourth Amendment warrant requirement, and, we add, the warrant requirement of Section 10 of Kentucky's Constitution.

It is well settled under the Fourth and Fourteenth Amendments that a search conducted without a warrant issued upon probable cause is "per se unreasonable . . . subject only to a few specifically established and well-delineated exceptions." Katz v. United States, 389 U.S. 347, 357, 19 L.Ed.2d 576, 88 S.Ct. 507 (1967).

There is no exception to be found here. Johnson did not consent to the search; on the contrary, his undivided attention was focused on the police officer questioning him while the other officer helped himself to the privacy of



Johnson's room. See Schneckloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973).

This was not a search incident to a lawful arrest. Johnson was not arrested until after the flashlight search. See Vale v. Louisiana, 399 U.S. 30, 90 S.Ct. 1969, 26 L.Ed.2d 409 (1970).

No crime had been committed in the presence of the police, nor did they have any reasonable belief that the defendant had committed a felony. See Shanks v. Commonwealth, Ky., 504 S.W.2d 709 (1974).

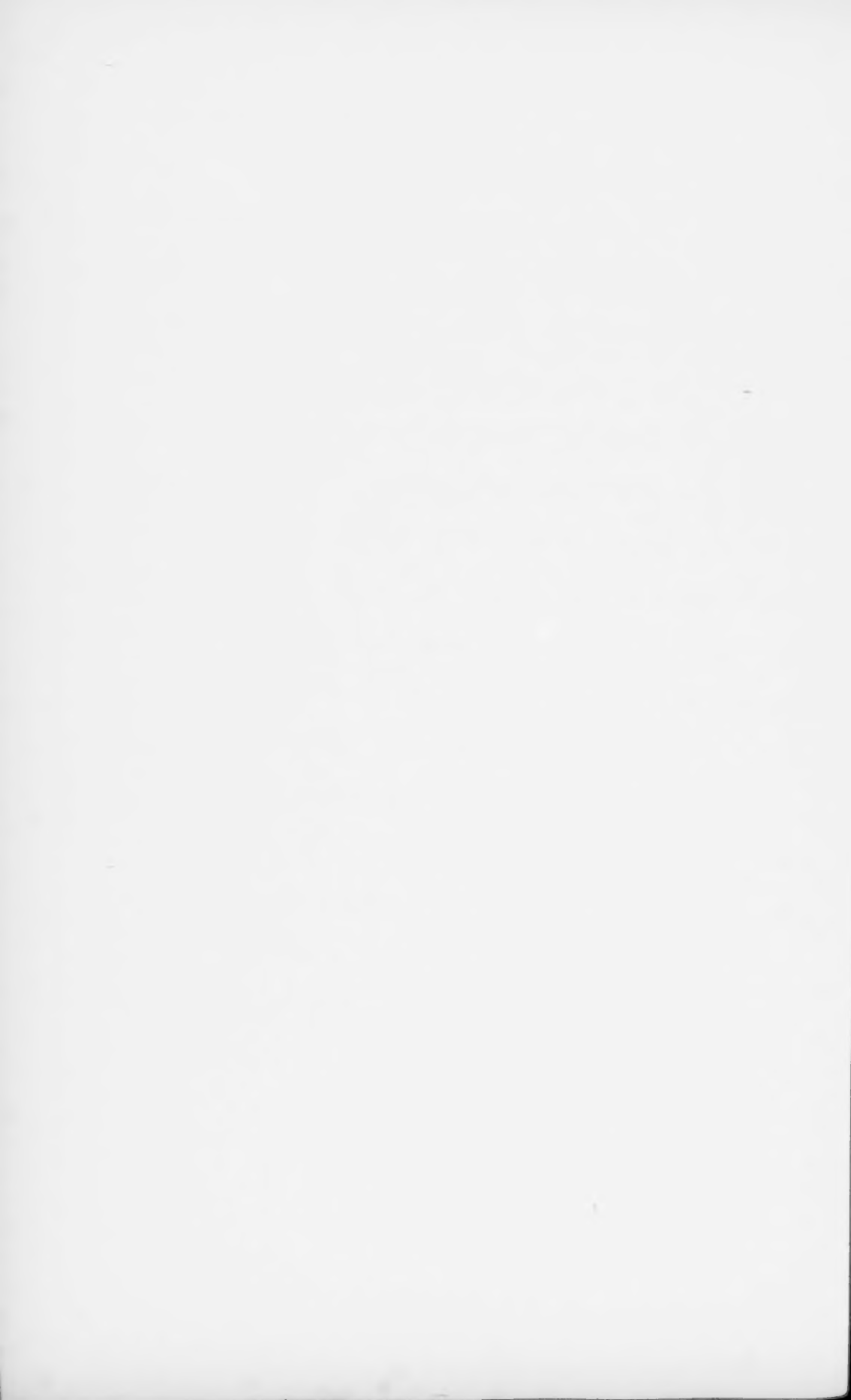
The officers were not responding to an emergency. They were not in hot pursuit of a fleeing felon. The goods they seized were not being destroyed or being removed from the jurisdiction. See Vale v. Louisiana, 399 U.S. 30 at 35.

The contents of Johnson's room were not in "plain view." The officer himself testified



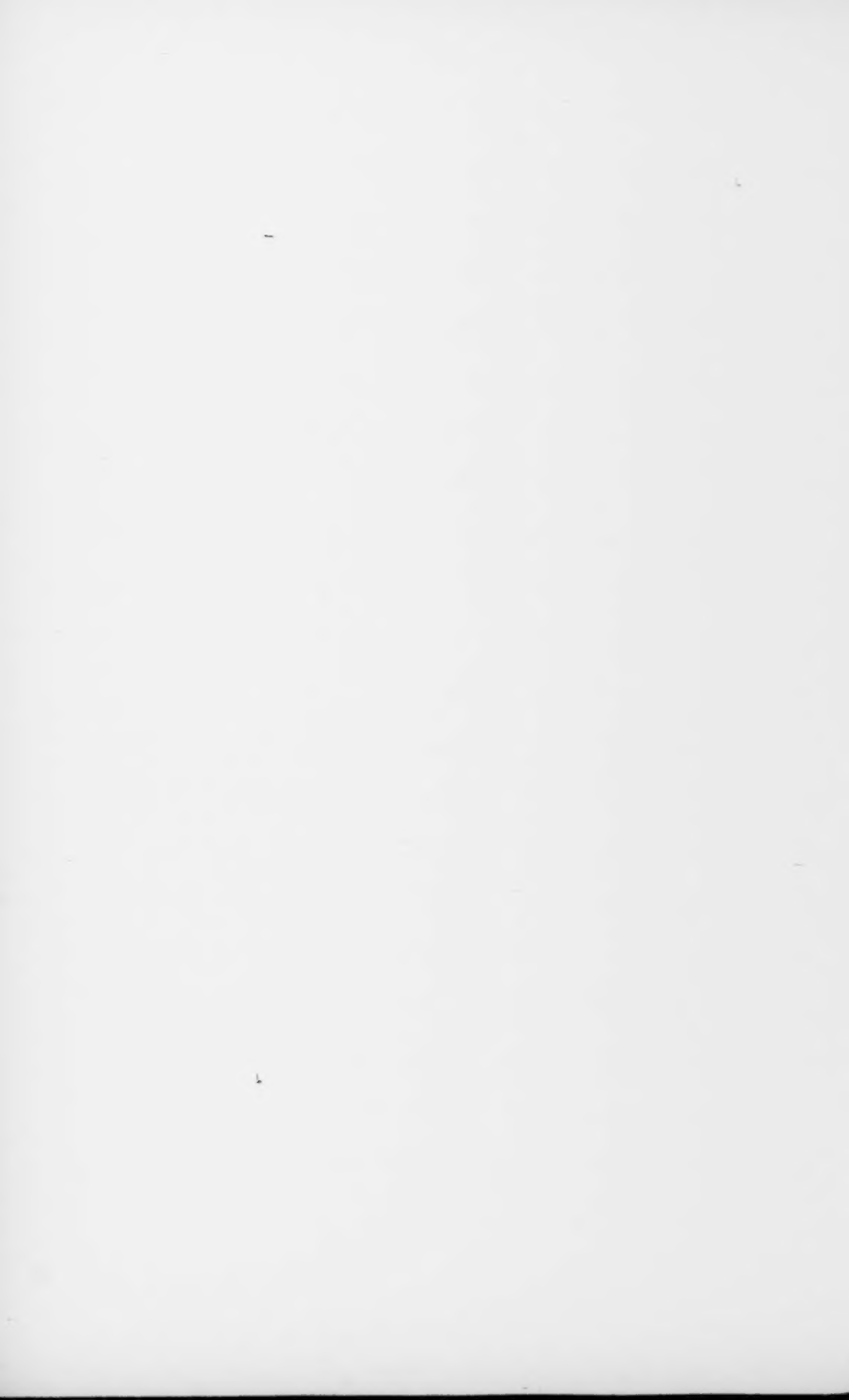
that he could see nothing without using the flashlight. See Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971)

Appellee cites Texas v. Brown, 460 U.S. 730, 103 S.Ct. 1535, 75 L.Ed.2d 502 (1983), for the proposition that the use of a flashlight by a police officer to enhance his examination of items visible from the sidewalk is permissible. However, Brown dealt with an officer's shining his flashlight's beam into a parked car. We have heard for years from the government that one's expectation of privacy within one's automobile is less than that to be expected within one's residence. It necessarily follows then that one's expectation of privacy within one's residence is greater than within one's automobile. Additionally, the officer's flashlight in Brown enhanced the visibility of items; here, the flashlight made the invisible visible.



We do not subscribe to the government's belief that the officer's discovery of the contraband by shining his flashlight into the room is constitutionally excusable because of his testimony that he did so "for his own protection." There was no evidence that any other person was with Johnson. No noises emanated from within the room. Indeed, shining a flashlight into a darkened room in which one suspects a culprit may be laying in wait would seem to do more to provoke a confrontation than passively closing the door.

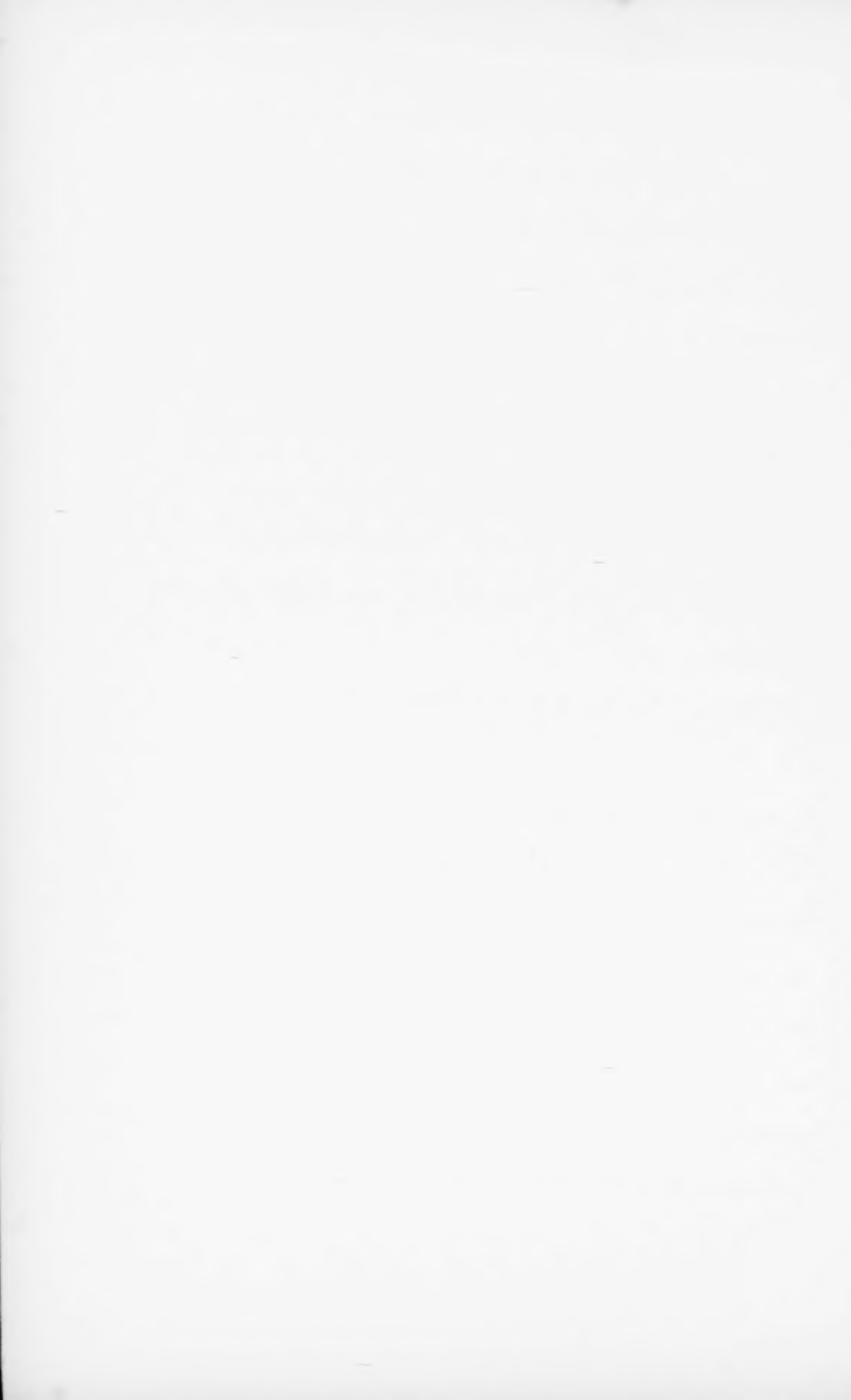
No "good faith" exception can be made here as announced in United States v. Leon, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984). The first search was patently illegal, and the officer's affidavit given to the magistrate to support the issuance of the warrant was clearly and materially misleading. He affied that he had seen "white powder and drug paraphernalia," but omitted any mention that he saw them only



because he searched a darkened room by illuminating it with a flashlight.

The evidence taken under the search warrant was clearly the fruit of the initial illegal search and seizure. Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). The trial court should have suppressed this illegally obtained evidence under the Fourth Amendment to the United States Constitution and Section 10 of the Kentucky Constitution.

We will not completely rehash our previous discussion of the general principles embodied by our federal and state constitutions, including their protection of citizens' privacy within motel rooms. We will rather begin our consideration of the Ramada Inn incidents by noting that the police literally forced their way into Johnson's motel room without a warrant. They had a warrant to search only Johnson's 1985 Cadillac.



The forced, warrantless entry into Johnson's Ramada Inn room constituted a search and seizure within the meaning of the Fourth Amendment. See Seura v. United States, 468 U.S. 796, 104 S.Ct. 3380, 82 L.Ed.2d 599 (1984).

There is no exception to the warrant requirement to be found here anymore than one could be found under the scenario that transpired at the Penny Pincher Motel.

Johnson did not consent to the search; indeed, he tried twice to close the door to prevent the police officers' entry. It does not improve the government's position to quote the officer who testified that Johnson did not ask them to leave. The government has the burden of justifying a warrantless, forcible entry into a citizen's motel room. See McDonald v. United States, 333 U.S. 451, 69 S.Ct. 191, 93 L.Ed. 153 (1948); United States v. Killebrew, 560 F.2d 729 (6th Cir. 1977). A lone citizen does not the bear the burden of disproving his final



acquiescence to the entry of his abode by a group of armed police officers, representative of the weighty authority of the government by the badges they wear.

The facts admit of no exception which would justify the government's unlawful behavior at the Ramada Inn. Their argument that they forced their way into Johnson's room out of concern for "our own personal safety as well as his own" holds water like a sieve. We are at a loss to understand how Johnson would have been endangered by putting on his pants in privacy. Moreover, if the officers were so concerned about their safety, in that Johnson could have procured a weapon while he put on his pants, why then, once they were inside the room, did they carelessly gawk around hither and yon as they did, instead of riveting their attention on Johnson? The police could have respected the constitutions and at the same time protected themselves by allowing Johnson his privacy and,

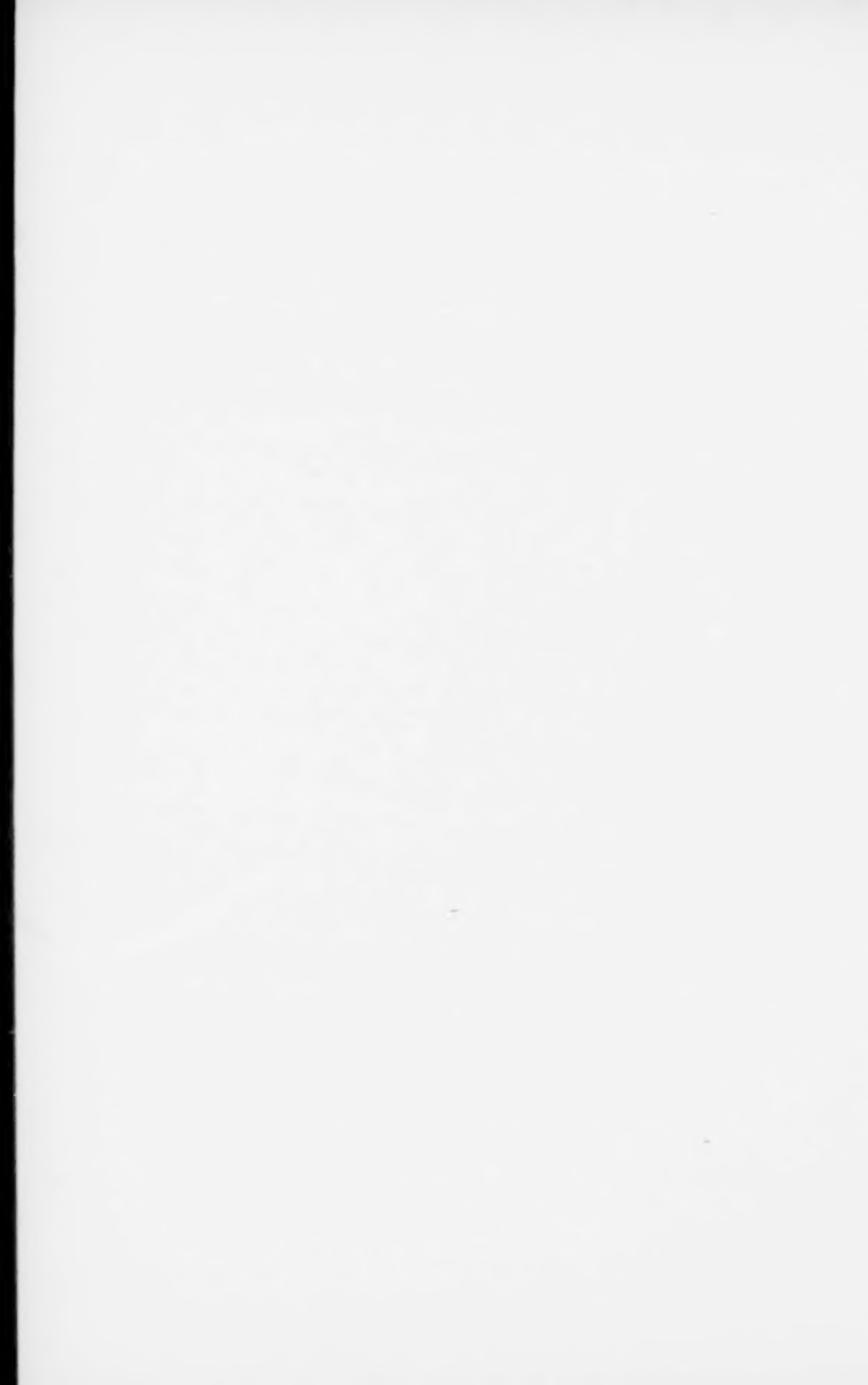
upon his return, performing a pat-down search for weapons pursuant to Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

The "good faith" exception to the Fourth Amendment exclusionary rule for searches and seizures conducted pursuant to warrants does not apply here. The "good faith" exception falls by the wayside and suppression remains as a remedy if

"the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth."

Leon, 468 U.S. 897 at 923.

The officer's affidavit in support of the warrant to search Johnson's room clearly and materially misled the magistrate. He affied that he could see the contraband from outside Johnson's room when in fact it did not become visible until after their forced entry. He also omitted the fact of the forced entry itself.



We close our opinion by recognizing and reaffirming the holding in Shanks v. Commonwealth, Ky., 504 S.W.2d 709, which is most appropriate here:

Until the officers entered room 253, their testimony disclosed, they had observed nothing which justified Shanks' arrest. "Since it (the arrest) was without warrant, it could be valid only if for a crime committed in the presence of the arresting officer or for a felony of which he had reasonable cause to believe defendant guilty." Johnson v. United States, 333 U.S. 10, 68 S.Ct. 367, 92 L.Ed. 436 (1948). There having been no probable cause for arresting Shanks revealed by the adduced testimony, the items seized should not have been admitted into evidence

The search and seizure cannot be validated under any of the carefully drawn exceptions to the constitutional requirement of a warrant.

Id. at 711.

The appealed convictions of Charles David Johnson were obtained by admission of illegally seized evidence. Inasmuch as we are reversing for the foregoing reason, it is unnecessary for us to consider Johnson's other claims of error.